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No. 85-2158

SUPREME COURT OF THE UNITED STATES

October Term, 1985

DALE BOWER AND RICHARD DAILEY
Petitioners
v.

RICHARD E. LYNG, et al.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

PRELIMINARY STATEMENT..... 2

ARGUMENT: REASONS FOR DENYING

THE WRIT 3

I. Introduction..... 3

II. The Courts Have Uniformly Held That The Farm Credit Act Does Not Provide A Private Right Of Action..... 4

III. The Decisions Of The Court Of Appeals And The District Court Are Correct..... 6

IV. Congress Has Recently Provided A Means Of Review For The Farm Credit System, And The Recognition Of A Private Right Of Action May Interfere With Congress' Preferred Method For Analysis Of The Farm Credit System..... 7

CONCLUSION..... 9

APPENDIX..... 1

Farm Credit Amendments Act of 1985.... 1

TABLE OF AUTHORITIES

Apple v. Miami Valley Production Credit Association, 614 F. Supp. 119 (S.D. Ohio 1985)..... 5

Birbeck v. Southern New England Production Credit Association, 606 F. Supp. 1030 (D.C. Conn. 1985)..... 5

Bowling v. Block, 602 F. Supp. 667 (S.D. Ohio 1985), aff'd, 785 F. 2d 556, (6th Cir. 1986)..... 5

Cort v. Ash, 422 U.S. 66 (1975)..... 6

Johanasen v. Production Credit Association of Marshall-Ivanhoe, 378 N.W. 2d 59 (Minn. App. 1985)..... 5

Smith v. Russellville Production Credit Association, 777 F.2d 1544 (11th Cir. 1985)..... 5

STATUTES

Farm Credit Act, 12 U.S.C. §2001.....passim

Farm Credit Amendments Act of 1985, Pub. L. No. 99-205 (1985)..... 7

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PRELIMINARY STATEMENT

Respondents[1] are satisfied with Petitioners' statement of the questions presented for review, list of parties to the proceeding, citation of the lower courts' opinions, jurisdictional statement, citation of applicable statutory provisions and statement of the case.

This brief is filed on behalf of the Fourth District defendants which include: The Federal Land Bank of Louisville; Federal Land Bank Association of Columbus; The Federal Intermediate Credit Bank of Louisville; Columbus Production Credit

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1. As required by Rule 28.1, Rules of the Supreme Court of the United States, all parent corporations, subsidiaries, and affiliates of each Fourth District corporate defendant are as follows: The Federal Land Bank of Louisville; Federal Land Bank Association of Columbus; The Federal Intermediate Credit Bank of Louisville; Columbus Production Credit Association, and the Fourth Farm Credit District.

Association, the Fourth Farm Credit District, Robert P. Hester, Ray Moss Tucker, B. Dale Harrison, James A. Rose, Lee F. Moffett, Gary French, Robert M. Hendrix, Sr. Because the defendants were named only in Count 1 of the Petitioners' Complaint, these respondents do not address the claims under the Administrative Procedure Act which were alleged in Count 2 of the Petitioners' Complaint. The Fourth District defendants were named as defendants in Count 1 only and this brief is accordingly addressed only to the issue of whether the petitioners may maintain a federal private cause of action under the Farm Credit Act of 1971.

ARGUMENT: REASONS FOR DENYING THE WRIT

I. Introduction

Petitioners must affirmatively establish any special or important reason

why this Court should exercise its discretionary jurisdiction. Petitioners have failed to advance any such reason and there is no such reason for the Court to review this case. As demonstrated below, the lower federal courts have uniformly concluded that a private party has no private right of action under the Farm Credit Act. The decision of the lower court rests squarely on the holdings of this Court and does not present an issue sufficiently important to warrant this Court's attention.

II. The Courts Have Uniformly Held That The Farm Credit Act Does Not Provide A Private Right Of Action.

The lower federal courts have concluded uniformly that the Farm Credit Act does not afford a private right of action. To date, only two decisions have been rendered by courts of appeal and both circuits agree that the Farm Credit Act does not provide

for a private cause of action. The Sixth Circuit decision below in Bowling v. Block, 785 F.2d 556 (6th Cir. 1986) followed the precedent set by the Eleventh Circuit in Smith v. Russellville Production Credit Association, 777 F.2d 1544 (11th Cir. 1985).

In addition, the district courts have held uniformly that no private cause of action is afforded by the Farm Credit Act. See Bowling v. Block, 602 F. Supp. 667 (S.D. Ohio 1985), Apple v. Miami Valley Production Credit Association, 614 F. Supp. 119 (S.D. Ohio 1985), and Birbeck v. Southern New England Production Credit Association, 606 F. Supp. 1030 (D.C. Conn. 1985). A state court also has reached the identical conclusion in Johanasen v. Production Credit Association of Marshall-Ivanhoe, 378 N.W. 2d 59 (Minn. App. 1985).

There is not a single reported decision that is in conflict with the holding below that the Farm Credit Act does not provide for a private cause of action. Respectfully, it is unnecessary for the Court to exercise its jurisdiction in this case.

III. The Decisions Of The Sixth Circuit Court Of Appeals And The District Court Are Correct.

The petitioners concede that the Farm Credit Act does not explicitly provide a private cause of action. As demonstrated in the lower court opinions, the four-part analysis established by this Court in Cort v. Ash, 422 U.S. 66 (1975) compels the conclusion that the Farm Credit Act does not create an implied private right of action.

IV. Congress Has Recently Provided A Means Of Review Of The Farm Credit System, And The Recognition of a Private Right of Action May Interfere with Congress' Preferred Method for Analysis of the Farm Credit System.

Petitioners suggest that judicial review is the only means of assuring that the Farm Credit Act is fully implemented. To the contrary, after this case was initiated and the District Court dismissed the complaint on February 6, 1985, Congress enacted the Farm Credit Amendments Act of 1985 on December 23, 1985. The Act contains measures to address the very concerns raised by the Petitioners. Among other provisions, Congress created the National Commission on Agricultural Finance which provides a means of review to assure that the Farm Credit Act is fully implemented and properly administered. Pub. L. No. 99-205, Title V, §501, 99 Stat. 1710 (1985), quoted in 12 U.S.C. §2001,

note. This Commission has one year from the date of its creation (Dec. 23, 1985) to "evaluate the structure, performance, and conduct of private lenders - commercial bankers and the Farm Credit System. . ." Id. at Title V, §501(c)(2). If there is a need for broad ranging review of the Farm Credit System such as petitioners seem to seek, Congress has enabled such review to occur by its creation of the Commission.

Congress also provided limited rights for judicial review to specific parties including the Farm Credit Administration and directors or officers who have received an order of removal or notice of suspension. Pub. L. No. 99-205, §204, Part C, §§5.25-.30, 99 Stat. 1694 (1985). However, Congress did not create a cause of action for any other parties. This Congressional decision supports the lower courts conclusion that no private right of

action should be inferred and confirms that Congress did not wish to grant such rights of action.

CONCLUSION

For the reasons set forth herein, Respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

The Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, 99 Stat. 1678-1712 (1985) provides in pertinent part:

ENFORCEMENT POWERS

Sec. 204. Title V of the Farm Credit Act of 1971 is amended by inserting after section 5.24, as so redesignated by section 203(b), the following:

PART C - ENFORCEMENT POWERS OF FARM CREDIT ADMINISTRATION

"Sec. 5.25. Cease and Desist Proceedings.--(a) If, in the opinion of the Farm Credit Administration, any institution in the Farm Credit System, or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such an institution is engaging or has engaged, or the Farm Credit Administration has reasonable cause to believe that the institution or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such institution is about to engage, in an unsafe or unsound practice in

conducting the business of such institution, or is violating or has violated, or the Farm Credit Administration has reasonable cause to believe that the institution or any director officer, employee, agent, or other person participating in the conduct of the affairs of such institution is about to violate, a law, rule, or regulation, or any condition imposed in writing by the Farm Credit Administration in connection with the granting of any application or other request by the institution or any written agreement entered into with the Farm Credit Administration, the Farm Credit Administration may issue and serve upon the institution or such director, officer, employee, agent, or other person a notice of charges in respect thereof. The notice shall contain a statement of the facts constituting the alleged violation or violations or the unsafe or unsound practice or practices, and shall fix a time and place at which a hearing will be held to determine whether an order to case and desist therefrom should issue against the institution or the director, officer, employee, agent, or other person participating in the conduct of the affairs of such institution. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after service of such notice unless an earlier or a later date is set by

the Farm Credit Administration at the request of any party so served. Unless the party or parties so served shall appear at the hearing personally or by a duly authorized representative, they shall be deemed to have consented to the issuance of the cease and desist order. In the event of such consent, or if upon the record made at any such hearing, the Farm Credit Administration shall find that any violation or unsafe or unsound practice specified in the notice of charges has been established, the Farm Credit Administration may issue and serve upon the institution or the director, officer, employee, agent, or other person participating in the conduct of the affairs of such institution an order to cease and desist from any such violation or practice. Such order may, by provisions that may be mandatory or otherwise, require the institution or its directors, officers, employees, agents, and other persons participating in the conduct of the affairs of such institution to cease and desist from the same, and further, to take affirmative action to correct the conditions resulting from any such violation or practice.

(b) A cease and desist order shall become effective at the expiration of thirty days after the service of such order upon the institution or other person

concerned (except in the case of a cease and desist order issued upon consent, which shall become effective at the time specified therein), and shall remain effective and enforceable as provided therein except to such extent as it is stayed, modified, terminated, or set aside by action of the Farm Credit Administration or a reviewing court.

Sec. 5.26. TEMPORARY CEASE AND DESIST ORDERS.--(a) Whenever the Farm Credit Administration shall determine that the violation or threatened violation or the unsafe or unsound practice or practices, specified in the notice of charges served upon the institution or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such institution under section 5.25, or the continuation thereof, is likely to cause insolvency or substantial dissipation of assets or earnings of the institution, or is likely to seriously weaken the condition of the institution or otherwise seriously prejudice the interests of the investors in Farm Credit System obligations or shareholders in the institution prior to the completion of the proceedings conducted under section 5.25, the Farm Credit Administration may issue a temporary order requiring the institution or such director, officer, employee, agent, or other person to cease and desist from

any such violation or practice and to take affirmative action to prevent such insolvency, dissipation, condition, or prejudice pending completion of such proceedings. Such order shall become effective upon service upon the institution or such director, officer, employee, agent, or other person participating in the conduct of the affairs of such institution and, unless set aside, limited, or suspended by a court in proceedings, authorized by subsection (b), shall remain effective and enforceable pending the completion of the administrative proceedings pursuant to such notice and until such time as the Farm Credit Administration shall dismiss the charges specified in such notice, or if a cease and desist order is issued against the institution or such director, officer, employee, agent, or other person, until effective date of such order.

(b) Within ten days after the institution concerned or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such institution has been served with a temporary cease and desist order, the institution or such director, officer, employee, agent, or other person may apply to the United States district court for the judicial district in which the

home office of the institution is located or the United States district court for the District of Columbia, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such other pending the completion of the administrative proceedings pursuant to the notice of charges served upon the institution or such director, officer, employee, agent, or other person under section 5.25, and such court shall have jurisdiction to issue such injunction.

Sec. 5.27. ENFORCEMENT OF TEMPORARY CEASE AND DESIST ORDERS.--In the case of violation or threatened violation of, or failure to obey, a temporary cease and desist order issued under section 5.26, the Farm Credit Administration may apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the institution is located, for an injunction to enforce such order, and, if the court shall determine that there has been such violation or threatened violation or failure to obey, it shall be the duty of the court to issue such injunction.

TITLE V--NATIONAL COMMISSION ON AGRICULTURAL FINANCE

Sec. 501.(a) The President shall appoint a National Commission on

Agricultural Finance. Such Commission shall be comprised of 15 members, of whom 7 shall be appointed by the President and 4 each by the Speaker of the House of Representatives and the President pro tempore of the Senate. The Commission shall consist of representatives of the financial community, the agricultural sector, and government.

(b) The National Commission on Agricultural Finance shall conduct a study of methods to ensure the availability of adequate credit to agricultural producers and agribusiness, taking into account the long-term financing needs of the agricultural economy; the roles of the commercial banks, the Farm Credit System, and the Farmers Home Administration in meeting those financial needs.

(c) In conducting such study, the National Commission on Agricultural Finance shall--

(1) evaluate the financial circumstances relative to both lenders and borrowers of farm credit;

(2) evaluate the structure, performance, and conduct of private lenders-commercial bankers and the Farm Credit System-and public lenders;

(3) explore the need for long-term assistance in stabilizing the value of agricultural assets; and

(4) evaluate the effect on suppliers, producers, processors, and local communities when financial institutions fail.

(d) Not later than one year after the date of enactment of this Act, the Commission shall submit a report containing the results of the study required by this section, together with comments and recommendations for legislation providing for a sound, reasonable, and primarily self-supporting credit program for farmers and ranchers as the Commission considers appropriate, to Congress.

(e) The Commission shall be comprised of volunteers and no Federal funds shall be expended by the Commission.